

## **Gender, Judging, and the Decision to Concur: Female Justices and the Supreme Court**

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**Abstract:** The role of gender in judicial decision-making has received attention from political scientists, legal scholars, and gender theorists. The present research takes up a less-examined thread of inquiry by exploring trends and patterns in the relationship between gender and judging on the U.S. Supreme Court. Specifically, I look for the influence of gender in the decision to write concurring opinions during the period from 1981 to 2015. After reviewing relevant research, I develop hypotheses that attempt to measure gender effects. In particular, I explore whether the gender of the justice writing the majority opinion affects the number and nature of concurring opinions issued. Specifically, when a female justice is assigned to write the majority opinion, does the likelihood of other justices in the majority writing a concurrence increase? I further ask whether conservative, male justices who have served the longest tenures are the most susceptible to this tendency. The paper concludes with a discussion of future research that may further elucidate the relationship between gender and justice on the U.S. Supreme Court.

**Draft—please contact author for updates.**

Prepared for the Annual Meeting of the Western Political Science Association, Las Vegas, Nevada, April 2-4, 2015. The author would like to thank Sonia Moctezuma for research assistance.

## Introduction

“Put simply, men judges do not always welcome their women colleagues.”

--Sally J. Kenny, *Gender and Justice*, 141.

“I work with eight very strong-willed colleagues. I don't think any of us exerts much power over the others. I certainly haven't found any Justice more or less willing to be persuaded by me because I am a woman.”

--Sandra Day O'Connor, *The Majesty of the Law*, 195.

As one can see from these introductory quotations, political scientists and political actors sometimes arrive at different conclusions. Gender and sex<sup>1</sup> have been studied as variables in the literature of judicial politics for over three decades. However, I contend that this topic has been understudied and theoretically underdeveloped as it relates to the U.S. Supreme Court. Specifically, until very recently we have not had sufficient sex variation to thoroughly study the effects of gender on decision making by Supreme Court justices. This paper is an attempt to outline the beginnings of such a research agenda.

To be sure, scholars have examined gender in the justice system in a number of important ways: normatively (e.g., Okin 1989), as a subject of rights and the law (e.g., Mansbridge 1986), and as a variable affecting juries (e.g., Badzinski and Pettus 1994), the public (e.g., Scherer and Curry 2007), attorneys (e.g., Martin, Reynolds, and Keith 2002), trial judges (e.g., Kritzer and Uhlman 1977), and appellate courts (e.g., Davis, Haire, and Songer 1993; Crowe 1999). The sex of participants comes up as a topic of importance throughout most discussions of the judicial process (e.g., Murphy, et al 2006). And, of course, the Court itself has addressed discrimination and differences between the sexes in myriad cases, on topics ranging from the right to vote to jury selection.<sup>2</sup> To date, though, studies of gender and the U.S. Supreme Court have necessarily been scant. As one scholar notes, “the justices, in particular the women, have received little attention in the press and scant academic consideration for their communication styles and rhetorical strategies” (Gutgold 2012, 5). Only recently have we begun to see scholarly biographies of female justices (e.g., Maveety 1996) and of the male justices who have served in the sex-integrated era of 1981 to the present (e.g., Yarbrough 2008, 2005). Indeed, only now can we begin to ponder questions about gendered judging whose answers require large amounts of empirical data.

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<sup>1</sup> The author appreciates that the term “sex” is typically used to denote physiological characteristics and the term “gender” is used to describe socially constructed behaviors and roles (see, for example, World Health Organization 2015). Given that the present research considers both the sex of judges and their (possibly) gendered behavior, the author has employed the terms somewhat interchangeably throughout, attempting to choose the best word for the given sentence.

<sup>2</sup> See *Leser v. Garnett* (1922) and *J.E.B. v. Alabama* (1994) respectively.

To that end, the present study begins to do just that. I will review the current state of literature on sex and gender as variables in the judiciary, draw from these wide-ranging analyses to develop some testable hypotheses for the Supreme Court, discuss the empirical data, and conclude with thoughts toward future research that may further elucidate the relationship between gender and justice.

### **Literature on Gender and the Judiciary**

In examining what has already been said on the roles of sex and gender in judging, I cannot pretend to do more than scratch the surface of this rich literature. I will focus attention here on those works that explore the roles of sex and gender on the behavior of judges themselves in the American context.<sup>3</sup> The most generalizable statement about this literature is that the results have been mixed, with researchers finding unqualified statistical evidence of a sex or gender effect less often than not.<sup>4</sup>

Flowing from Gilligan (1982) and others' psychological theories of male and female difference, as well as from the feminist legal scholar movement, a good deal of early work examined whether men and women judges decide cases differently—whether they employ a 'different voice.' Though this approach has been pejoratively—if accurately—described as essentialist, it seems to have been a necessary first step toward understanding the changes that might occur once women began occupying the bench in larger numbers during the Carter era.<sup>5</sup> For example, Davis (1992, 171) compared opinions by male and female judges on the Ninth Circuit Court of Appeals and concluded that the women's opinions used a "contextual rather than a rule-based approach" sometimes, but not necessarily more often than the men's opinions. Davis, Haire, and Songer (1993; also, Songer, Davis, and Haire 1994) examined federal circuit courts and found that female judges were statistically more likely to support claimants in employment discrimination cases and criminal defendants in search and seizure cases. In criminal trial courts, Fox and Van Sickle (2000) concluded that both male and female judges exhibited both male and female voice traits and Coontz (2000) found that male and female judges came to significantly different conclusions when faced with hypothetical case scenarios. At the state court level, Maule's study (2000) of the Minnesota Supreme Court found that female justices exhibited a higher rate of agreement on family law cases than ideology would predict. Other researchers look more broadly at female state supreme court justices and

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<sup>3</sup> To be sure, this topic has been explored comparatively as well. See, for example, Remiche (2015).

<sup>4</sup> Though Boyd, Epstein, and Martin's (2010) cataloging of such studies finds a sex difference in 24 of 34 published studies, most of these only find differences in very limited areas. Moreover, given that there is likely a bias against publishing studies that merely confirm the null hypothesis, their figure is likely on the generous side.

<sup>5</sup> President Jimmy Carter appointed more women to the federal bench than all previous presidents combined (Kenny 2013, 20). For early work exploring potential difference, see Martin (1990).

conclude that these judges do behave differently than male judges when cases involve women's issues (Allen and Wall 1993) and vote more liberally in general (Songer and Crews-Meyer 2000). Overall, though, they find little support for the essentialist claim that female judges think differently than male judges.

Moving slightly beyond essentialism and toward a lived experience argument, Beiner (2003, 614) makes a normative argument for increasing judicial diversity because doing so "will lead to a richer debate in decision making because of differing perspectives based on race and gender." While Beiner largely focuses on the potential for differences in case outcomes, she also notes that more female judges could affect such non-case outcomes as civility and courtroom interactions. What I take from such a claim is not necessarily that men and women possess some essential difference, but that gender diversity has an impact on social processes. It is that line of inquiry that I will pursue below.

Other Court observers have made similar claims regarding differences in lived experiences. These remarks in the popular press about Justice O'Connor are illustrative: "A closer look at O'Connor's recent decisions—and at others throughout her tenure—suggests that she often is driven not by ideology, but by general pragmatism and life experiences that are atypical among the current justices. She was a rancher's daughter who was taught the virtues of rugged individualism; a woman lawyer who had trouble finding work in a profession dominated by men" (Biskupic 2004). As O'Connor herself noted (1991, 1554) when discussing careers and family life, "the choices that women must make in this respect are different from the choices men must make."

More recent studies have tended to move beyond sex to include the impact of gender on the judiciary as well. Standpoint theory has provided theoretical grounding for much of the research covering both sex and gender.<sup>6</sup> Martin, Reynolds, and Keith (2002), for example, argue that female attorneys and judges observe more gender bias, which makes them more likely to develop feminist consciousness, which may lead to different legal outcomes. In Kenny's (2013, 4) *Gender and Justice*—perhaps the most thorough, recent, and relevant broad study of the topic—the author makes a compelling case for examining gender as a variable that may lead to differing judicial outcomes: "we can learn a lot from using sex as a variable, but only if it is coupled with an understanding of gender as a social process that is more complex than binary and essentialist understandings of sex differences allow."<sup>7</sup> Boyd, Epstein, and Martin (2010)

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<sup>6</sup> Standpoint theory argues that "individuals' social location in the sex-gender system affects their experiences, interpretations, and ultimately consciousness" (Martin, Reynolds, and Keith 2002, 667).

<sup>7</sup> Kenny (2013, 16) explains further: "gender is not just a synonym for sex or a euphemism for women but a social relationship based on perceived difference and symbolizing power. Gender is not a category, nor the traits or roles ascribed to such a category; it is a social process that actively differentiates by sex and devalues women and the feminine. Gender is institutionalized in many ways; its processes are entangled in diverse other processes of

provide one example of such scholarship when they look at the effect of the gender composition of three judge panels on the U.S. Court of Appeals. The authors want to know “whether and in what ways serving with a female judge causes males to behave differently” (389). Though they look at 13 issue areas, they only find a gendered panel effect when the case subject matter is sex discrimination. This “panel effects” research performed on appellate courts (see also Peresie 2005) is probably the closest previous work to get at the phenomenon I want to investigate on the Supreme Court. The advantage of studying appellate courts is volume, which may explain why so much recent effort has focused there.

Other recent work also points to the complex role that gender plays in judicial decisions. Glynn and Sen’s (2015) study of U.S. federal appellate courts finds that judges (male or female) with daughters are 7 percent more likely to render decisions favoring women. Collins, Manning, and Carp (2010) find that male and female judges start behaving differently in some areas of law once a critical mass of female judges has been reached in a given jurisdiction. Clearly the process of gender matters. The next important step seems to be further elucidating how it matters on the U.S. Supreme Court. In doing so, one must bring gender into a manageable and measurable form in an empirical examination. I anticipate that there will be aspects of this analysis that will fall short of that goal, or that will reduce gender to too simplistic a dichotomy. To minimize such limitations, the next section attempts to carefully work through theory development.

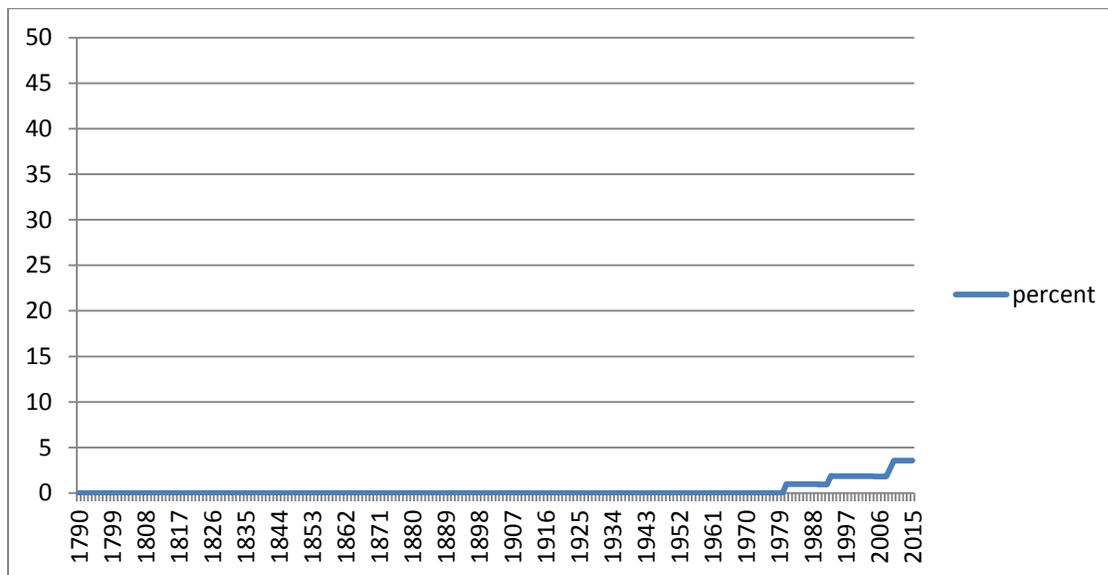
### **Some Theoretical Starting Points**

Given the findings of previous studies, it seems there are a few topics worth investigating further when turning our attention to the Supreme Court. For one, it seems crucial to examine not just sex but, as Kenny (2013) implores, to investigate gender as a social process. So, what might such an examination look like? How might gender be a social process at work among the nine justices? First, I suspect that one would not have to delve too far back into the Court’s history. Though the Court has obviously long considered cases involving women, it has rarely been considered progressive in its views on gender. Segal and Spaeth (2002, 159) note that the Court did not admit that there are changing gender roles in society until the 1975 case *Stanton v. Stanton*.<sup>8</sup> Though there was a female law clerk as early as 1944, the “brethren” did not interact with a female peer until 1981, allowing an already conservative institution to remain even further behind the times. The rapid changes of the past few decades are striking when seen graphically (see Figure 1 and Table 1).

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difference and inequality and embedded in the traditions, rituals, practices, and discourses that make up social institutions.”

<sup>8</sup> 421 U.S. 7 (1975).

**Figure 1: Women as a Percentage of All Justices Who Have Served, 1790-2015****Table 1: Number of Female Justices, 1790-2015**

Years	Number (Names)
1790-1980	0
1981-1993	1 (O'Connor)
1993-2006	2 (O'Connor, Ginsburg)
2006-2009	1 (Ginsburg)
2009-2010	2 (Ginsburg, Sotomayor)
2010-2015	3 (Ginsburg, Sotomayor, Kagan)

Next, while a good deal of the previous research has assumed that differences between men and women will lie in the subject matter of cases, or case outcomes, or how men and women think about the law differently, that is not my interest here.<sup>9</sup> Instead, I want to look at the subtle issue of how men and women may behave differently towards each other when other factors are set aside. All else being equal, is the decision-making dynamic different when men and women are engaging with each other rather than, as was traditional, men only engaging with other men? Put another way, if gendered male judges view their jobs from a different standpoint than do gendered female judges, will this lead them to behave differently when they engage with each other, *ceteris paribus*?

<sup>9</sup> To be sure, it *may* be that case subject matter is important because it serves as a reminder of gender differences, but that is not the main focus of this research.

But where, specifically, should political scientists look for evidence of such gendered processes? I suggest that one appropriate location is in the behavior of justices when choosing to write separately, namely in the form of concurring opinions. A number of scholars have sought to better understand the dynamics of concurrence in recent years. In their impressive study of Court collegiality, Maltzman, Spriggs, and Wahlbeck (2000) note that justices make strategic use of concurrence as a way of pursuing policy preferences. Corley (2010) examines the content of concurring opinions and concludes that justices use them as a tool to communicate with multiple audiences and to achieve goals beyond case outcomes. Finally, Maveety, Turner, and Way (2010) have documented growth in the number of justices joining concurrences and in the number of concurrences generally since the Burger era.

Even though, to my knowledge, the role of gender in concurring behavior has not been thoroughly investigated<sup>10</sup>, we do know that on appellate benches “institutional roles are not the only characteristics of judges that matter. Judicial behavior may also be influenced by the background characteristics of the individual judges on the panel” (Hettinger, Lindquist, and Martinek 2006, 38). Moreover, the high court specifically is the most appropriate location to examine these separate opinions since, as Justice Ginsburg herself notes (1992, 1191), they “characterize Supreme Court decisions to a much greater extent than they do court of appeals three-judge panel decisions.” Thus, it would be in line with previous studies to explore the role gender may play in Supreme Court concurrences.

Even scholars who focus on ideology as the driving factor of judicial behavior accept that, with the decision to concur, other factors may be at play. Interestingly, Segal and Spaeth (1993, 294) make the following observation about Justice O’Connor: “O’Connor, however, was among the worst offenders in precluding formation of majority opinion coalitions. Her unwillingness to yield when others were assigned to write the opinion of the Court may have exacerbated the intransigence of those who specially concurred when she was assigned the opinion of the Court.” This dynamic raises an interesting question for scholarship: why was there this subtle antagonism? When we are talking about the Court’s first female justice in its 200 year history, it stands to reason that gender *might* be a part of the equation. It is certainly a factor worth exploring. Moreover, gender as a social process is intertwined with a society’s culture and values—and it is judges’ *values* that are at the historical core of the attitudinal model (Segal and Spaeth 1993, 67). So, to the extent that views on gender form part of one’s values, and lived experiences that differ by sex affect one’s values, nothing I propose here is inconsistent with attitudinalism, though, to be sure, it is not an attitudinalist study, per se.

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<sup>10</sup> Maule (2000) suggests that concurrences may be the best place to look for gender differences in jurisprudence because they offer an outlet for displaying different manners of thinking without arriving at different conclusions. She does not find support for this particular claim. Maveety, Turner, and Way (2011) find mixed results when including sex of the majority author as an independent variable in a regression model to predict concurrences.

These starting points lead to a more focused central research question: does the process of gender manifest itself on a sex-diverse Supreme Court? Specifically, is there evidence that the sex of the majority opinion writer affects the other justices? If so, can this effect be seen in the decision to write or join a concurrence?

The causal story I am suggesting is that the Supreme Court is an old, elite, conservative venue in which the relatively recent presence of women may feel disruptive and justices who are not used to deferring to women will feel the need to "correct" or "clarify" an opinion they essentially agree with more often in these cases. The general hypothesis is that the gender of the justice writing the majority opinion affects the number and nature of concurring opinions issued. Specifically, when a female justice is assigned to write the majority opinion, the likelihood of other justices in the majority writing a concurrence increases. Undoubtedly I am looking for the vestiges of an unconscious sexism in an unlikely place. But they certainly exist elsewhere; they may well exist here too. As a secondary matter, I further suspect that conservative, male justices who have served the longest tenures will be most susceptible to this tendency. Though one might suspect (and hope) that such an interaction will decrease over time, given the relatively short time period and small number of justices under investigation here, the hypotheses I investigate below do not account for time.<sup>11</sup>

Note that this explanation does not consider the sex of the concurring justice as a primary issue. While men *may* be more likely to concur with a female majority opinion author, that is more a question of sex than gender, and so it is of secondary importance here. It may be that women concur just as often in such cases because they are subject to the same treatment of gender in our society. It may be that women concur less often in such cases as a conscious act of solidarity. It may be that both of those factors are at play and the result leaves little that can be clearly discerned from the data.

For an example of why it might be important to look at concurring opinions to see this gendered dynamic, consider *U.S. v. Castleman* (2013).<sup>12</sup> In this recent case, Justice Sotomayor was the majority opinion author and justices Scalia and Alito wrote special concurrences (with Justice Thomas joining the latter). The case focuses on the relationship between the terms "physical force" and "domestic violence." In writing the Opinion of the Court, Sotomayor defines the latter term broadly, relying on common law usages, and distinguishes the interpretation of the former term from its use in an earlier case. Though Scalia joins her opinion in part, he writes separately to weaken the majority opinion by narrowing its scope. Scalia

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<sup>11</sup> Time will also provide a broader array of justices to study. We know, for example, that Justice O'Connor was herself a frequent concurren and influential in the development of a pragmatic "O'Connorist" jurisprudence (Maveety 2008, 127-8). Over time, such individual characteristics will become part of a larger picture and, perhaps, a clearer pattern.

<sup>12</sup> No. 12-1371.

writes: “Unfortunately, the Court bypasses that narrower interpretation...in favor of a much broader one,” and spends most of his concurrence explaining why none of Sotomayor’s analyses “withstands scrutiny.”<sup>13</sup> In considering legislative intent—an activity he rarely engages in—Scalia scoffs at the notion “that Congress adopted a meaning of ‘domestic violence’ that included the slightest unwanted touching.”<sup>14</sup> He describes as an “absurdity...at war with the English language” the majority’s claim that the term ‘domestic violence’ includes acts that do not normally meet the definition of violence. He arrives at his conclusions through “precedent, text, and common sense.” Justice Alito’s concurrence, which Thomas joins, merely points out that he had dissented in the case Sotomayor distinguishes from here and that his views have not changed.<sup>15</sup> His concurrence does not attempt to limit the definition of domestic violence, but merely explains he had come to this conclusion on different grounds four years earlier.

A few observations are in order. First, and most obviously, it is a case whose subject matter fits squarely within the realm of cases where we might expect men and women judges to behave differently, whether due to essential differences, differences in lived experiences, etc. Certainly Scalia’s incredulity regarding the illegality of “the slightest unwanted touching” is an opinion that comes from a privileged standpoint. It is hard to believe that someone who has ever had to consider domestic violence as a crime that he could conceivably be the victim of could have written such a concurrence. On the other hand, the other two male justices in concurrence appear willing to go even further than the majority opinion in broadening the meaning of domestic violence. Justice Alito’s concurrence is devoid of any explicitly gendered statements, yet the fact remains that he wrote separately rather than signing on to the majority opinion.

A second observation is that even with these special concurrences, there is still an Opinion of the Court that can serve as binding precedent. While true here, it is not always. Consider *Yates v. United States* (2015), a case where the Court considered the pressing question of whether fish are tangible objects.<sup>16</sup> Justice Alito’s decision to concur in this case makes Justice Ginsburg’s opinion only that of a plurality. Such cases get at the importance of something other than ideology or strategy at play. While Alito’s remarks are clever, one would be hard pressed to explain how they are jurisprudentially significant. Might a more subtle social process—like gender—have led Alito to concur?

*Castleman* is also a case where the two other female justices joined the female opinion writer and three men concurred. This is a pattern that I suspect is common. The test will be to identify such a pattern that exists independently of case subject matter, ideology, and other

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> That case was *Johnson v. U.S.* 559 U.S. 133 (2010). Thomas joined Alito’s dissent in that case as well.

<sup>16</sup> No. 13-7451.

variables. Finally, *Castleman* is a case where the concurrences are the only place to look for potential gender differences. A 9-0 decision, it has no dissents and, moreover, has no ideological or strategic component to the disposition of the case. Granted, the three concurers are among the Court's most conservative members, but they voted in favor of the government just like everyone else. Though a single case offers nothing in the way of proof, it is suggestive and illustrative; there may be something beyond ideology and strategy at work here. It might be gender.

As a caveat, I must note that it is quite possible that the reality of gender and judging is not as I have described it above. Other influences on decision making certainly exist and, to the extent that they do, will tend to mask and obscure the dynamic I have outlined. What if, for example, women justices have often played the (gendered) role of being accommodating? In other words, what if female justices, when assigned the majority opinion, have gone to greater lengths, on average, than their male colleagues to secure an opinion of the Court and to address the preferences of those in the majority bloc? If this has occurred, then empirical results may show that female authored opinions are actually *less* likely to attract concurrences. In other words, It is possible that gendered acts of male justices (not deferring to women) will be offset by gendered acts of female justices (accommodating others, perhaps especially men). At the end of the day, even if gendered processes exist, the analysis employed here may not be sufficient to reveal them clearly.

One could also argue that much of the evidence that has led to development of this theory comes from the federal circuit courts, where there are many judges and panels are constantly rotating. The Supreme Court, on the other hand, is a much more stable body, where the justices get to know each other well, often over the course of many years. One might consider the well documented friendship between Justice Ginsburg and Justice Scalia and conclude that there is no way Justice Scalia would treat his good friend discourteously or in a sexist manner. But this reasoning is insufficient. If we know that the Ginsburg-Scalia friendship definitely does not trump their ideological choices, why would it be appropriate to assume it overrides (a potentially unconscious) sexism? All collegiality and friendships aside, the process of gender persists.

Another caveat is that I am not exploring case subject matter here. Though others have found gender effects in specific areas, such as sex discrimination (Boyd, Epstein, and Martin 2010) and employment discrimination (Songer, Davis, and Haire 1994), I do not employ that approach here because the question I am asking is whether or not there are observable gender dynamics independent of case subject matter. If justices are reacting specifically to the gender of the majority opinion writer, then we should find evidence of their doing so irrespective of case content.

Finally, and perhaps most significantly, I am not unaware of the objection that the scenario described above does not accurately capture the real world. One might object that my description of judicial behavior is nothing like what justices really think and how they really behave. "Indeed," one might argue, "Supreme Court justices are among the most educated members of our society and have a job that explicitly focuses on issues of justice, equality, and discrimination. They should be among the least likely members of society to exercise something like gender bias." This is a fair criticism, but the empirical data suggests it is too optimistic. As Kenny (2013, 143) observes: "surveys, hearings, focus groups, and state and federal taskforces on gender bias conducted in the 1980s and 1990s routinely found that women judges received less respect from lawyers and other judges." Concerning the Supreme Court specifically, Garrow (1996) reports that Justice Scalia "deeply wounded" Justice O'Connor with the insulting language he has sometimes used in his opinions. Moreover, models are always shorthand.<sup>17</sup> And when we are attempting to get at a largely unconscious process, they are likely to be clunky. If we view gender as such a social process, and judicial behavior (at least in part) as an unconscious product of our social system, then not even members of the Court are likely to be immune from unconscious sexism. As justices *are* educated experts, they may be adept at hiding traits they see as undesirable, such as gendered behavior. The trick, then, is finding manifestations of gender. And to that endeavor we now turn.

### **Descriptive Data**

In order to begin testing empirically the theoretical arguments outlined above, I will offer a broad overview of the Court's activity during the period under investigation—the Court's 1981-2014 terms.<sup>18</sup> As seen in Table 2 below, due to the changing composition of the Court, the number of opinions written by male and female justices varies greatly. I have used the term concurring voices to refer to the total number of concurring justices—both those writing and those joining a concurrence—because this count is the most relevant to the questions at hand. Female justices have authored about 17 percent of all majority opinions between 1981 and 2014, with over half of that total being written by Justice O'Connor.

Though a clear pattern does not emerge from this simple count, a first glance suggests that justices are *less* likely to concur when the majority author is female. Indeed, the number of concurring voices is 99 percent of the number of majority opinions when the majority author is

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<sup>17</sup> I do take some comfort in the fact that other—somewhat successful—models of judicial behavior also cause discomfort (see Segal and Spaeth 2002; 1993).

<sup>18</sup> Data for all except the 2014 term are from the *2014 Supreme Court Database* (Spaeth, et al 2014). Data from the most recent term was entered manually from information found at the Legal Information Institute (2015) website and is current through 3/19/2015.

male, but only about 84 percent when the majority author is female. But this rough count may be masking some important considerations. In fact, the table raises some interesting questions: Are there significant differences in these concurrence rates? Would different patterns emerge if regular concurrences and special concurrences were separated? Does the number of female justices on the Court play a role? How does the number of dissenting justices affect the concurrence numbers? Are there sex differences between the concurrers in column three and those in column five? Are there other characteristics of the justices which might help us better understand the differences highlighted below? To begin answering those questions, the next section develops some empirical tests.

**Table 2: An Overview of Gender and Concurrence**

<b>Court terms (female justices)</b>	<b>Cases with male majority author</b>	<b>Concurring Voices</b>	<b>Cases with female majority author</b>	<b>Concurring Voices</b>
1981-1992 (1)	1412	1298	186	170
1993-2005 (2)	776	830	224	192
2006-2008 (1)	186	185	22	7
2009 (2)	56	79	17	24
2010-2014 (3)*	201	217	99	70
<b>Total</b>	<b>2631</b>	<b>2609</b>	<b>548</b>	<b>463</b>

\*Through 3/19/2015

### First Tests

Given past research, the theory-building above, and some knowledge of the existing data, what hypotheses can be developed and tested regarding the relationship between gender and judging on the Supreme Court? I suggest the following:

H<sub>0</sub>: All else being equal, there will be no significant difference between the number of concurrences or concurring justices whether the majority opinion author is male or female.

H<sub>1</sub>: When the majority opinion author is female, there will be more concurrences than when the majority opinion author is male.

H<sub>2</sub>: When the majority opinion author is female, there will be more concurring justices than when the majority opinion author is male.

H<sub>3</sub>: When the majority opinion author is female, tenure, ideology, and sex of the other justices may also influence the decision to concur, with conservative, male justices with more years on the bench being the more likely to concur.

I will first explore these hypotheses using only the gender variable, then test further with Hypothesis 3, which includes variables for ideology, sex, and length of tenure, as well as controls for workload, case salience, and case complexity. I will also examine the role that special concurrences, the total number of female justices on the Court, and the total number of justices in the majority might play in determining the number of concurring justices.

### **Future Tests and Theories**

As noted from the outset, this research examines only a small part of the world of the U.S. Supreme Court and marks only one angle for getting at the process of gender at work there. Where else should scholars look if they wish to better understand the role that gender as a social process might play on the Court? A few locations seem paramount. First, the collected papers of the justices themselves should provide a rich resource. Justice Blackmun served during the first fifteen years of the period under investigation here and is widely recognized as having the most comprehensive set of publically available papers during this era. Justices O'Connor and Ginsburg also have public papers currently available for academic use. These often candid notes and other writings may unintentionally reveal gendered forces of which the authors themselves might not have even been aware. Such sources might also aid in developing a more nuanced understanding of how each individual justice interacts with gender as a social process. This understanding might enable a skilled researcher to develop a typology of gendered judicial behavior, or a more thorough qualitative understanding of each justice. It might be particularly informative to take a comparative case study approach to a number of cases where gender is or is not expected to matter to better understand whether the justices themselves are conscious of a gendered process.

A second source of qualitative information on the process of gender on the Court would be interviews with law clerks. Immersed in the Court culture on a daily basis, clerks may have useful observations about how male and female justices and clerks treat each other. Indeed, the likelihood of gender as an observable process among the clerks themselves would add additional layers to this story.

Further quantitative work is clearly needed as well. In addition to completing the task laid out here in earlier sections, it is likely worth examining additional variables and how they might come into play. It would certainly be worthwhile to continue investigating case subject matter, though, as stated above, there were important reasons for not doing so here. If not yet, then certainly at some future point, it will be worth exploring whether gendered effects decrease over time, as the presence of female justices becomes more normalized and as the

odds of all justices having experience serving on a diverse bench increase.<sup>19</sup> In particular, and following the lead of earlier research (e.g., Boyd, Epstein and Martin 2010), one could examine whether gender has a panel effect on the Supreme Court. In other words, does the number of female justices influence the decision-making process? Examining change over time would also allow one to further the critical mass research of Collins, Manning, and Carp (2000). We are already at the point where we can look for differences in behavior based on 0-3 female justices and the range of data can only increase in the future.

Finally, though I suspect concurring opinions are a good locus for revealing gender processes, they may be displayed elsewhere as well. Dissenting opinions, though more likely to be affected by ideology, might also provide evidence that informs our understanding of gender. Discussion at oral argument, vote changing, and opinion assignment might also prove insightful. One could also explore how gender might influence the rule of four in forming the docket. Though the justices selecting particular cases may not be known, we do know the number of female justices at any given time and can see whether that variable leads to differences in case selection.

My point with what I have started to explore above and what I have suggested we do in the future is not that the process of gender significantly affects all Supreme Court behavior. It is merely that we know it is a process that matters sometimes and it would enhance our understanding of the U.S. Supreme Court if we focused greater attention on that body. As the number of female justices grows, our opportunities for research will continue to expand.

### Cases and Works Cited

Allen, David W., and Diane E. Wall. 1993. "Role Orientations and Women State Supreme Court Justices," *Judicature* 77(3): 156-65.

Badzinski, Diane M., and Ann Burnett Pettus. 1994. "Nonverbal Involvement and Sex: Effects on Jury Decision Making," *Journal of Applied Communication Research* 22(November): 309-321.

Beiner, Teresa M. 2003. "The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium," *U. C. Davis Law Review* 36(February): 597-617.

Biskupic, Joan. 2004. "O'Connor not confined by conservatism," *USA Today*, 24 June, p.4A.

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<sup>19</sup> Though, to be sure, it may also be the case that the growing diversity of the bench may create a backlash effect (see Kenny 2013, 137). The decision to concur might present a subtle, even unconscious, form of such a backlash.

- Boyd, Christina L., Lee Epstein, and Andrew D. Martin. 2010. "Untangling the Causal Effects of Sex on Judging," *American Journal of Political Science*, 54 (2): 389-411.
- Collins, Paul M., Jr., Kenneth L. Manning, and Robert A. Carp. 2010. "Gender, Critical Mass, and Judicial Decision Making," *Law & Policy* 32(2): 260-81.
- Coontz, Phyllis. 2000. "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?" *Gender Issues* (Fall): 59-73.
- Corley, Pamela C. 2010. *Concurring Opinion Writing on the U.S. Supreme Court*. Albany: SUNY Press.
- Crowe, Nancy E. 1999. "The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Court of Appeals, 1981-96," Unpublished Ph.D. dissertation, University of Chicago.
- Davis, Sue. 1992. "Do Women Judges Speak 'In a Different Voice?': Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit," *Wisconsin Women's Law Journal* 8: 143-73.
- Davis, Sue, Susan B. Haire, and Donald R. Songer. 1993. "Voting Behavior and Gender on the U.S. Court of Appeals," *Judicature* 77(3): 129-33.
- Fox, Richard, and Robert Van Sickle. 2000. "Gender Dynamics and Judicial Behavior in Criminal Trial Courts: An Exploratory Study," *The Justice System Journal* 21(3): 261-80.
- Garrow, David J. 1996. "The Rehnquist Reins." *The New York Times Magazine*. 6 October.
- Gilligan, Carol. 1982. *In A Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.
- Ginsburg, Ruth Bader. 1992. "Speaking in a Judicial Voice," *New York University Law Review* 67(December): 1185-1209.
- Glynn, Adam N., and Maya Sen. 2015. "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" *American Journal of Political Science* 59 (1): 37-54.
- Gutgold, Nichola D. 2012. *The Rhetoric of Supreme Court Women: From Obstacles to Options*. Lanham, MD: Lexington Books.
- Hettinger, Virginia, Stephanie A. Lindquist, and Wendy Martinek. 2006. *Judging on a Collegial Court: Influences on Appellate Court Decision Making*. Charlottesville, VA: University of Virginia Press.
- J.E.B. v. Alabama*, 511 U.S. 127 (1994).

*Johnson v. U.S.*, 599 U.S. 133 (2010).

Kenny, Sally J. 2013. *Gender and Justice: Why Women in the Judiciary Really Matter*. New York: Routledge.

Kritzer, Herbert M., and Thomas M. Uhlman. 1977. "Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition," *Social Science Journal* 14(2): 77-88.

Legal Information Institute. 2015. Cornell University Law School. <https://www.law.cornell.edu>.

*Leser v. Garnett* 258 U.S. 130 (1922).

Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge.

Mansbridge, Jane. 1986. *Why We Lost the ERA*. Chicago: University of Chicago Press.

Martin, Elaine. 1990. "Men and Women on the Bench: Vive La Difference?" *Judicature* 73(4): 204-8.

Martin, Patricia Yancey, Jorn R. Reynolds, and Shelley Keith. 2002. "Gender Bias and Feminist Consciousness among Judges and Attorney: A Standpoint Theory Analysis," *Signs* 27(3): 665-701.

Maule, Linda S. 2000. "A Different Voice: The Feminine Jurisprudence of the Minnesota Supreme Court," *Buffalo Women's Law Journal* 9: 295-316.

Maveety, Nancy. 2008. *Queen's Court: Judicial Power in the Rehnquist Era*. Lawrence: University Press of Kansas.

\_\_\_\_\_. 1996. *Sandra Day O'Connor: Strategist on the Supreme Court*. Lanham, MD: Rowman & Littlefield.

Maveety, Nancy, Charles C. Turner, and Lori Beth Way. 2010. "The Rise of the Choral Court: Use of Concurrence in the Burger and Rehnquist Courts," *Political Research Quarterly* 63 (3): 627-39.

Maveety, Nancy, Lori Beth Way, and Charles C. Turner. 2011. "Roberts' Rules of Writing," Paper presented at the American Political Science Association Annual Meeting, Seattle, WA.

Murphy, Walter F., C. Herman Pritchett, Lee Epstein, and Jack Knight. 2006. *Courts, Judges, & Politics: An Introduction to the Judicial Process*, 6<sup>th</sup> ed. New York: McGraw-Hill.

- O'Connor, Sandra Day. 2003. *The Majesty of the Law: Reflections of a Supreme Court Justice*. New York: Random House.
- \_\_\_\_\_. 1991. "Portia's Progress," *New York University Law Review* 66(December): 1546-58.
- Okin, Susan Moeller. 1989. *Justice, Gender, and the Family*. New York: Basic Books.
- Peresie, Jennifer L. 2005. "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts," *Yale Law Journal* 114(7): 1759-90.
- Remiche, Adélaïde. 2015. "A Gender Perspective on the French and American Judiciaries." *Journal of Law and Courts* 3 (1): 95-114.
- Scherer, Nancy, and Brett Curry. 2007. "Does Gender Diversity on the Bench Impact Citizens' Perceptions of Justice?" Paper presented at the American Political Science Association Annual Meeting, Chicago, IL.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge.
- \_\_\_\_\_. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge.
- Songer, Donald R., and Kelley A. Crews-Meyer. 2000. "Does Judge Gender Matter? Decision Making in State Supreme Courts," *Social Science Quarterly* 81(3): 750-62.
- Songer, Donald R., Sue Davis, and Susan Haire. 1994. "A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals." *Journal of Politics* 56 (2): 425-39.
- Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2014. 2014 Supreme Court Database, Version 2014 Release 01. URL: <http://Supremecourtdatabase.org>
- Stanton v. Stanton*, 421 U.S. 7 (1975).
- U.S. v. Castleman*, No. 12-1371 (2013).
- World Health Organization. 2015. "What Do We Mean by 'Sex' and 'Gender'?" <http://www.who.int/gender/whatisgender/en/> (2 February 2015).
- Yarbrough, Tinsley E. 2008. *Harry A. Blackmun: The Outsider Justice*. New York: Oxford University Press.

\_\_\_\_\_. 2005. *David Hackett Souter: Traditional Republican on the Rehnquist Court*. New York: Oxford University Press.

*Yates v. United States*, No. 13-7451. (2015).